

SERVICE DATE – APRIL 9, 2013

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 6 (Sub-No. 482X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN COOK COUNTY,
ILL.

Digest:¹ This decision allows the BNSF Railway Company (BNSF) to end its common carrier obligation to provide rail service over a 2.14-mile rail line in Cook County, Ill., subject to standard employee protection conditions. It also imposes environmental conditions requiring BNSF to consult with certain state and Federal agencies prior to removing railroad tracks and ties on the line. Finally, the decision requires BNSF to keep certain structures in place and sets a time period for BNSF to negotiate with parties interested in turning the line into a recreational trail.

Decided: April 8, 2013

By petition filed on December 21, 2012, BNSF Railway Company (BNSF) seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon an approximately 2.14-mile rail line between Station 36 + 70, north of the Chicago Sanitary and Ship Canal Bridge, and Station 149 + 87, at the end of the track near Western Avenue, in Cook County, Ill. (the Line). Notice of the petition was served and published in the Federal Register on January 10, 2013 (77 Fed. Reg. 2,316).

On January 29, 2013, a request for issuance of a notice of interim trail use (NITU) and public use condition for the Line was filed on behalf of the City of Chicago by the Chicago Department of Transportation (Trail Sponsor). BNSF responded by a letter filed on January 30, 2013, indicating that it does not object to the issuance of the NITU. On February 6, 2013, a request for the issuance of a Public Use Condition was filed by Brian Lynch, Laurence Rohter, James Novak, and Gabrielle Souder (collectively, Public Use Proponents). The exemption will be granted subject to public use, trail use, environmental, and standard employee protective conditions.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

BNSF first attempted to abandon the Line in 1999, but the Board denied its petition. See The Burlington N. & Santa Fe Ry.—Aban. of Chicago Area Trackage in Cook Cnty., Ill., AB 6 (Sub-No. 382X) (STB served Sept. 21, 1999). At the time, the Line had four potential shippers; two then-current shippers submitted filings with the Board opposing the abandonment and disputing BNSF's representations and two prior shippers opposed the abandonment. The Board determined that BNSF had submitted insufficient information to allow the Board to "make a determination of the profitability of the line" and denied BNSF's petition. Id., slip op. at 6.

In 2000, the Central Illinois Railroad Company (CIRR) filed a notice of exemption to lease a line from BNSF that included the Line at issue here. See Cent. Ill. R.R.—Lease & Operation Exemption—Lines of Burlington N. & Santa Fe Ry. Co. at Chicago, Cook Cnty., Ill., FD 33960 (STB served Dec. 5, 2000). In 2010, the Board permitted CIRR to cease service over that line, after which BNSF resumed providing rail service. See Cent. Ill. R.R.—Discontinuance of Serv. Exemption—In Cook Cnty, Ill., AB 1066 (Sub-No. 2X) (STB served Nov. 16, 2010). According to BNSF, the Line was embargoed on October 28, 2011, due to poor track conditions.²

BNSF states that only one shipper, Pure Asphalt Company (Pure Asphalt), has received service over the Line in the past five years. Pure Asphalt received six carloads in 2009, no carloads in 2010, and four carloads in 2011 prior to the embargo. According to BNSF, Pure Asphalt apparently has used other modes of transportation for the vast majority of its traffic.³ BNSF states that it is seeking an exemption to abandon the Line because it has experienced operating losses since it resumed operations over the Line in 2010.

According to BNSF, the segment of the Line that serves Pure Asphalt requires significant rehabilitation. That portion of track requires tie replacement on various segments, installation of track panels, surfacing, replacement of a turnout, the renewal of a street crossing, and installation of new signal cables. BNSF estimates the cost of rehabilitating that segment to be \$650,000. BNSF states that the net liquidation value of the Line is \$3,330,000 based on the value of the real estate.

² BNSF Pet. 5, n.2

³ BNSF's petition shows that BNSF served a copy on Pure Asphalt, but neither Pure Asphalt nor any other shipper has filed in opposition to the abandonment proposal.

BNSF claims that continued operation of the Line would be a substantial financial burden. Revenue for the Forecast Year⁴ would only be \$780, according to BNSF. Continued operation of the Line in the Forecast Year, according to BNSF, would result in an operating loss of \$3,594 and an annual opportunity cost of \$595,187, for a total economic loss of \$598,781 in the Forecast Year.

BNSF contends that granting the exemption will foster sound economic conditions and encourage efficient management. Moreover, BNSF states that Pure Asphalt has been utilizing other modes of shipping and, accordingly, that competition and the continuation of a sound rail system will not be affected if the petition is granted.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned without prior approval from the Board. Under 49 U.S.C. § 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

As detailed below, BNSF has demonstrated that the Line proposed for abandonment would incur an operating loss during the Forecast Year. BNSF has also shown that the Line requires substantial rehabilitation expenditures and that it would incur significant opportunity costs if it continues to operate the Line. Accordingly, we find below that this transaction meets the exemption criteria under 49 U.S.C. § 10502, and we will grant BNSF's petition for an exemption to abandon the Line.

Forecast Year Revenue. BNSF estimates that, during its Forecast Year, revenues generated by the Line would total \$780. In calculating its revenue, BNSF bases its estimates upon Pure Asphalt's past usage of the Line. According to BNSF, Pure Asphalt received six carloads in 2009, no carloads in 2010, and four carloads in 2011 prior to the embargo. The Line is stub-ended and not capable of handling overhead traffic. No party has challenged this figure, and we will accept it as the best evidence of record.

Rehabilitation Costs. BNSF claims that in order to rehabilitate the line to FRA Class I standards, it would need to make repairs and improvements totaling \$650,000, including \$180,000 for the installation of track panels, \$135,000 in tie replacement costs, \$20,000 for surfacing,

⁴ "Forecast Year means the 12-month period, beginning with the first day of the month in which the application is filed with the Board, for which future revenues and costs are estimated." 49 C.F.R. § 1152.2(h).

\$140,000 to replace a turnout, \$155,000 to renew the 31st Street crossing, and \$20,000 for new signal cables. In addition, in order to safely serve Pure Asphalt, BNSF claims that it would also need to replace the ties on the bridge crossing the Chicago Sanitary and Ship Canal at a cost of \$260,000. Again, no party has contested these estimates, so we will accept them as the best evidence of record.

Forecast Year Loss. The record indicates that BNSF would incur a total economic loss of \$598,781 in the Forecast Year. This number is derived from BNSF's projected revenue of \$780 less the estimated avoidable cost of \$4,374 (representing \$2,783 for transportation costs, \$33 for locomotive costs, \$26 for return on value-locomotives, and \$1,532 in off-branch costs) less the total return on value of \$595,187. This estimated amount is based upon reasonable facts and assumptions and is the only evidence of record. No party has come forward to dispute BNSF's claim of significant operating losses or to oppose the abandonment.

Opportunity costs. Opportunity costs (or total return on value of railroad property) reflect the economic loss experienced by a carrier from forgoing a more profitable alternative use of its assets. Here, BNSF has asserted opportunity costs of \$595,187 during the Forecast Year, calculated by multiplying the valuation of property of \$3,328,785 by 17.88%, the nominal rate of return⁵ less the holding gain. No party has challenged BNSF's opportunity cost figure, so we will accept it as the best evidence of record.

Because of BNSF's estimated Forecast Year operating loss, and the substantial rehabilitation costs and opportunity costs it would incur, all of which are uncontested, we find that the rail transportation policy objectives of 49 U.S.C. § 10101 are met without subjecting this transaction to the more detailed scrutiny required under 49 U.S.C. § 10903. By minimizing the administrative expense of the application process, an exemption in this case would expedite regulatory action and reduce regulatory barriers to exit, in accordance with 49 U.S.C. §§ 10101(2) and (7). An exemption would also foster sound economic conditions and encourage efficient management by allowing BNSF to save the expenses of maintaining and operating a Line that is unprofitable. See 49 U.S.C. §§ 10101(5) and (9). Other aspects of the rail transportation policy would not be adversely affected by use of the exemption process.

More detailed scrutiny of the proposed abandonment of the Line is not necessary to protect shippers from an abuse of market power here.⁶ As BNSF asserts, total usage of the Line

⁵ Under 49 C.F.R. § 1152.34(d), the rate of return used to calculate return on value represents the individual railroad's current pre-tax nominal cost of capital. Our most recent after-tax cost of capital finding for the railroad industry is used as a basis for developing the appropriate nominal rate of return.

⁶ Given the market power finding here, the Board need not determine whether the proposed transaction is limited in scope.

has varied by only a small percentage annually over the four-year period from 2009 to 2012, and has dropped to zero since the Line was embargoed. Moreover, Pure Asphalt, the only shipper on the Line, has not objected to the abandonment exemption. Further, according to BNSF, Pure Asphalt has other transportation alternatives. Nevertheless, to ensure that this shipper has been informed of the Board's action, BNSF will be required to serve a copy of this decision on Pure Asphalt so that it is received within five days of the service date of this decision and notice, and to certify contemporaneously to the Board that it has done so.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979) (Oregon Short Line).

Environmental Review. BNSF has submitted a combined environmental and historic report and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) has examined the environmental and historical report, verified BNSF's data, and analyzed the probable effects of the proposed action on the quality of the human environment.

OEA issued an Environmental Assessment (EA) in this proceeding on February 19, 2013, recommending that three conditions be imposed on any decision granting abandonment authority.

In the EA, OEA states that the Illinois Environmental Protection Agency (IEPA) commented that the proposed abandonment may require a General National Pollution Discharge Elimination System (NPDES) permit because it may result in a land disturbance greater than or equal to one acre. Thus, OEA recommends a condition that BNSF consult with IEPA prior to the commencement of any salvage activities and comply with any reasonable NPDES requirements.

OEA further states in the EA that there are seven protected biological species in Cook County, Ill. Although OEA believes that adverse impacts to these species are unlikely, OEA recommends a condition that, prior to commencement of any salvage activities, BNSF consult with the U.S. Fish and Wildlife Service (USFWS) regarding the potential impacts from salvaging activities to federally listed threatened and endangered species that may occur in the vicinity of the Line. OEA recommends that BNSF report the results of these consultations in writing to OEA prior to the onset of salvage operations.

Also in the EA, OEA notes that the National Geodetic Survey (NGS) has not submitted comments regarding the impact of the proposed abandonment on any geodetic survey markers that may be present in the project area. Accordingly, OEA recommends requiring BNSF to consult with NGS prior to commencing salvage activities.

Comments to the EA were due by March 21, 2013. No comments were received. Based on OEA's recommendations, the Board concludes that the proposed abandonment, if implemented as conditioned, would not significantly affect either the quality of the human environment or the conservation of energy resources.

Interim Trail Use.

As indicated above, the Trail Sponsor has filed a request for the issuance of a NITU for the Line under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29 to provide time to negotiate with BNSF for acquisition of the right-of-way for use as a recreational trail and for rail banking. The Trail Sponsor has submitted a statement of willingness to assume full responsibility for the management of the right-of-way, for any legal liability arising out of the transfer or use of the right-of-way, and for the payment of any and all taxes that may be levied or assessed against the right-of-way, as required by 49 C.F.R. § 1152.29. The Trail Sponsor has also acknowledged that the use of the right-of-way for trail purposes is subject to the sponsor's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on January 30, 2013, BNSF stated that it did not object to the issuance of the requested NITU.

Because The Trail Sponsor's request complies with the requirements of 49 C.F.R. § 1152.29 and BNSF is willing to enter into interim trail use negotiations, we will issue a NITU for the Line. The parties may negotiate an agreement during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h); Nat'l Trails Sys. Act & R.R. Rights-of-Way, EP 702 (STB served Apr. 30, 2012) (effective May 30, 2012). If no agreement is reached within 180 days, BNSF may fully abandon the Line, subject to the conditions imposed below. See 49 C.F.R § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

Public use.

Concurrent with its request for a NITU, the Trail Sponsor has also requested the imposition of a public use condition. As noted, Public Use Proponents have also sought the imposition of such a condition.

The Board has determined that persons who request a NITU under the Trails Act may also seek a public use condition under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Rail Abans.). When the requirements for both conditions are met, it is the Board's policy to impose them concurrently, subject to the execution of a trail use agreement. The Trail Sponsor and the Public Use Proponents have met the public use criteria prescribed at 49 C.F.R. § 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) the justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the Line, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the Line for public use. If a trail use agreement is reached on a portion of the right-of-way, BNSF must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to negotiate to acquire a right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, BNSF is not required to deal exclusively with the Trail Sponsor or the Public Use Proponents, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. § 10904. As stated in Rail Abans., 2 I.C.C.2d at 608, an offer of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations takes priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 C.F.R. § 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 C.F.R. § 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 C.F.R. § 1152.27(f). Finally, if the Line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by BNSF of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line and the conditions that BNSF shall:

(1) be prohibited from disposing of the corridor (other than tracks, ties, and signal equipment) and from removing or destroying potential trail-related structures (such as bridges, trestles, culverts, and tunnels) for a 180-day period from the effective date of this decision and notice to enable any state or local government agencies, or other interested person, to negotiate the acquisition of the Line for public use;

- (2) comply with the interim trail use/rail banking procedures set forth below;
- (3) consult with IEPA prior to the commencement of any salvage activities and comply with any reasonable NPDES requirements;
- (4) consult with USFWS regarding the potential impacts from salvaging activities to federally listed threatened and endangered species that may occur in the vicinity of the Line and report the results of these consultations in writing to OEA prior to the onset of salvage operations; and
- (5) consult with NGS prior to commencing salvage activities on the Line and if NGS identifies geodetic station markers that may be affected by the proposed abandonment, BNSF shall notify NGS at least 90 days prior to beginning salvage activities that will disturb or destroy any geodetic station markers in order to plan for the possible relocation of the geodetic station markers by NGS.

2. BNSF is directed to serve a copy of this decision on Pure Asphalt so that it is received within five days of the service date of this decision and notice, and to certify contemporaneously to the Board that it has done so.

3. If an interim trail use/rail banking agreement is reached, it must require the Trail Sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

4. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the Trail Sponsor's continuing to meet its responsibilities described in ordering paragraph 3 above.

5. If an agreement for interim trail use/rail banking is reached by October 6, 2013, the parties shall jointly notify the Board within ten days that an agreement has been reached, 49 C.F.R. § 1152.29(d)(2) and (h), and interim trail use may be implemented. If no agreement is reached by that time, BNSF may fully abandon the Line, provided the conditions imposed above are met. See 49 C.F.R. § 1152.29(d)(1). If an interim trail use/rail banking agreement is executed before October 6, 2013, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the Line.

6. If interim trail use is implemented, and subsequently the Trail Sponsor intends to terminate trail use on all or any portion of the rail line covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by April 19, 2013, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1). Each OFA must be accompanied by the filing fee of \$1,600. See 49 C.F.R. § 1002.2 (f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: “Office of Proceedings, AB-OFA.”

9. Provided no OFA has been received, this exemption will be effective on May 9, 2013. Petitions to stay must be filed by April 24, 2013. Petitions to reopen must be filed by May 6, 2013.

10. Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by BNSF’s filing of a notice of consummation by April 9, 2014, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.